

SERVICE DATE – MAY 25, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42120

CARGILL, INCORPORATED v. BNSF RAILWAY COMPANY

Digest:<sup>1</sup> This decision denies partial reconsideration of the Board’s January 4, 2011 decision, to the extent it granted BNSF Railway Company’s motion to dismiss Cargill, Inc.’s claim alleging that BNSF is double recovering revenue from the fuel surcharge it assesses on Cargill’s shipments.

Decided: May 23, 2012

On January 24, 2011, Cargill, Incorporated (Cargill) filed a petition for partial reconsideration of the Board’s decision served on January 4, 2011 (January 4 Decision). That decision granted in part BNSF Railway Company’s (BNSF) motion to dismiss two of the three counts in Cargill’s complaint challenging the lawfulness of the fuel surcharges collected by BNSF on shipments moved for Cargill. Cargill asks on reconsideration that it be allowed to amend the count dismissed by the Board. BNSF filed a reply on February 7, 2011. In this decision, we are denying Cargill’s request for partial reconsideration.

BACKGROUND

In a complaint filed under 49 U.S.C. § 11701(b), Cargill challenged the lawfulness of the mileage-based fuel surcharge collected by BNSF under “[BNSF Rules Book 6100-A,] Item 3375L, Section B, and its predecessor and successor iterations.” Complaint at 3. Cargill alleged that BNSF’s fuel surcharge constitutes an unreasonable practice under 49 U.S.C. § 11702(2), asserting that: (1) “the general formula [used] to calculate the fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption” for the relevant traffic (the “Reasonable Nexus” claim); (2) BNSF uses the surcharge to “extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied” (the “Profit Center” claim); and (3) BNSF is “double recovering the same incremental fuel cost increases BNSF has incurred in providing service to Cargill by (i) setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of \$0.73 per gallon implicit in the Assailed Tariff Item;<sup>2</sup> and (ii) increasing the Cargill base rates

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Elsewhere, BNSF has identified the “strike price” as the “entry point” for its fuel  
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(including the fuel component in the base rates) via rate adjustments, while, at the same time, requiring Cargill to pay, in addition to the adjusted base rates on these movements, the fuel surcharge set forth in the Assailed Tariff Item” (the “Double Recovery” claim). *Id.* at 3-4. Cargill asked the Board to: (1) find the fuel surcharge practices unreasonable and to order BNSF to cease and desist from such practices; (2) prescribe reasonable fuel surcharge practices; and (3) award monetary damages with interest under 49 U.S.C. § 11704(b) for all unlawful fuel surcharge payments made.

BNSF filed a motion to dismiss Cargill’s Profit Center and Double Recovery claims, and its request for damages with interest on all three claims, under the principles established in Union Pac. R.R. v. ICC (Union Pacific), 867 F.2d 646 (D.C. Cir. 1989),<sup>3</sup> Rail Fuel Surcharges (Fuel Surcharges), EP 661 (STB served Jan. 26, 2007); and Dairyland Power Coop. v. Union Pac R.R. (Dairyland), NOR 42105 (STB served July 29, 2008). In the January 4 Decision, the Board: (1) denied the motion to dismiss the Profit Center claim; (2) dismissed the Double Recovery claim; (3) denied as premature the motion to dismiss Cargill’s request for damages with interest; and (4) issued a procedural schedule.

The Board dismissed the Double Recovery claim because it contravened the Board’s decision in Fuel Surcharges and the D.C. Circuit’s ruling in Union Pacific. The Board acknowledged that in Fuel Surcharges it had banned a form of double recovery, but noted that its ruling was limited to one specific type (“double dipping”) in which a carrier makes inherently inconsistent representations by “imposing a fuel surcharge ostensibly as a way to recover the increased cost of fuel while at the same time justifying an increase in the base rate by referring to an index that explicitly accounted for the same increased cost of fuel.” January 4 Decision, slip op. at 5. The Board added that it was concerned that allowing Cargill’s Double Recovery count to proceed would require the agency to engage in the difficult if not impossible task of deconstructing base rates to determine their fuel cost component. *Id.* at 6.

In response, Cargill filed its petition for partial reconsideration.<sup>4</sup> Asserting that its Double Recovery claim was dismissed “because [it] did not contain ‘any allegations of

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surcharge. Comments of BNSF at 16, EP 661, Rail Fuel Surcharges. The Board in the January 4 Decision understood BNSF’s reference to the “entry point” to mean the fuel price level at which the fuel surcharge begins to accrue.

<sup>3</sup> In Union Pacific, the D.C. Circuit concluded that our predecessor, the Interstate Commerce Commission, had impermissibly engaged in rate regulation when it found that charging more to offset extra costs incurred in transporting spent nuclear fuel constituted an unreasonable practice. The Board’s pronouncements in Fuel Surcharges were designed to conform to that holding.

<sup>4</sup> In a letter filed on February 14, 2011, Cargill also requests leave to supplement its complaint to include BNSF Rules Book 6100-A, Item 3376D, Section B (which Cargill describes

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misleading or inconsistent representations to shippers,” Cargill states that it “now has the benefit of the Board’s guidance on how to properly plead its Double Recovery Claim.” Petition for Partial Reconsideration at 5. Accordingly, Cargill asserts that partial reconsideration of the January 4 Decision is justified and “requests that, on reconsideration, the Board grant Cargill leave to amend its ‘Double Recovery Claim’ in a manner that comports with the Board’s [decision].” Id. at 1. Specifically, Cargill seeks leave to “amend its Double Recovery Claim to include misrepresentation allegations.” Id. at 5.

Cargill does not propose to amend its complaint to include an allegation that BNSF increases the base rates that Cargill pays via an index or adjustment mechanism that includes a fuel cost component. Rather, Cargill wishes to amend its complaint to allege that BNSF has represented that its fuel surcharges are intended to obtain recovery only of fuel cost increases not recovered in their base rates. Specifically, Cargill states that, in 2006, BNSF represented in the Fuel Surcharge proceeding that “[s]ince it began in 2001, the goal of BNSF’s fuel surcharge has been to ensure that BNSF is compensated *for increases in the cost that were not embedded in the transportation rate offered to the customer*” and that “BNSF never intended that fuel surcharges be sources of additional operating income for the railroad.”<sup>5</sup> Cargill contends that these statements by BNSF show that the Board’s concerns about deconstructing base rates are unfounded, as BNSF itself “separately identif[ies] the fuel cost component in its base rates.” Petition for Partial Reconsideration at 7. Cargill also points to a 2010 pricing update in which BNSF told shippers that, “to avoid over or under recovery of its increased fuel cost changes, shippers’ ‘base rates would be appropriately adjusted to reflect the new strike price of \$2.50 per gallon.’”<sup>6</sup> Given BNSF’s admission that fuel costs are embedded in its base rates, Cargill argues that BNSF is making inherently inconsistent representations “when it applies a rate adjustment

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as a successor to Item 3375L, Section B), or any other fuel surcharge tariff that is applied to common carrier shipments. Item 3376D, Section B, reset BNSF’s surcharge strike price from \$1.25 to \$2.50 per gallon beginning January 2011 and adjusted the mileage-based fuel surcharge for agricultural products effective on or around March 11, 2011. BNSF, in a letter-reply filed on February 22, 2011, argues that Cargill should not be permitted to amend or supplement its complaint asserting that Item 3376D, Section B, sets out the terms of a new fuel surcharge program, which under 49 C.F.R. § 1111.2 requires the filing of a new complaint. Cargill filed a letter-reply to BNSF’s reply and a pleading styled “Supplement to Complaint” on March 4, 2011, and BNSF filed an “Answer to Supplement to Complaint” on March 22, 2011. We will resolve the issue raised by these pleadings in a future decision.

<sup>5</sup> Cargill Petition for Partial Reconsideration at 4-5 (citing Rail Fuel Surcharges, EP 661, BNSF’s Comments filed Oct. 2, 2006 at 2.

<sup>6</sup> Id. at 5. Cargill cites as the source of this statement BNSF’s Pricing Update to All BNSF Carload Customers (dated July 26, 2011), but the statement was actually made a year earlier in BNSF’s Pricing Update to All BNSF Carload Customers (dated July 26, 2010).

procedure, even one based on an index that excludes a fuel component, to the entire base rate, while at the same time collecting a fuel surcharge.” Id. at 7.

Leave to amend should be granted, Cargill asserts, because its Double Recovery claim raises issues of first impression. Additionally, Cargill contends that the requested relief would be consistent with Dairyland, where the Board, instead of granting the railroad defendant’s motion to dismiss, denied the motion while giving the parties guidance on the showings needed to prove unreasonable practice allegations under the Board’s new fuel surcharge rules.

In response, BNSF argues that Cargill’s Double Recovery claim is fundamentally flawed because it is essentially a challenge to the level of rates charged Cargill—a challenge that cannot be pursued as an unreasonable practice claim. BNSF maintains that the critical elements in the unreasonable practice of “double dipping,” as explained by the Board in Fuel Surcharges, are the carrier (1) capturing increased fuel costs through a fuel surcharge; and (2) adjusting the base rate by means of an index that reflects fuel cost increases. BNSF contends that, absent the use of an adjustment mechanism that contains a fuel cost component to increase base rates, “the application of a fuel surcharge to base rates that may be adjusted from time to time is not an unreasonable practice.” Reply to Petition for Partial Reconsideration at 6.

## DISCUSSION AND CONCLUSIONS

Cargill seeks partial reconsideration under 49 C.F.R. § 1115.3, but instead of addressing the standards for granting reconsideration, it requests permission to replead its Double Recovery claim. We will therefore treat Cargill’s petition as a petition for leave to amend its complaint. We grant leave to amend a complaint only if the proposed amended complaint “state[s] a cause of action.” 49 C.F.R. § 1111.2(a). As explained below, Cargill’s proposed amendments to its complaint still do not state a Double Recovery cause of action. Accordingly, Cargill’s petition for leave to amend its complaint will be denied.

In the January 4 Decision, the Board determined that Cargill’s Double Recovery count did not warrant further investigation, explaining that: (1) the Board had prohibited double dipping only because it involved making “inherently inconsistent representations: imposing a surcharge ostensibly as a way to recover the increased cost of fuel while at the same time justifying an increase in the base rate by referring to an index that explicitly accounted for the same increased cost of fuel;”<sup>7</sup> (2) Cargill had not alleged that BNSF increased its base rates with

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<sup>7</sup> January 4 Decision, slip op. at 5; See also Fuel Surcharges, slip op. at 10-11 (“[t]he only circumstance in which the use of both a fuel surcharge along with a rate escalator would not constitute “double dipping” is when the fuel component has been subtracted out of the index. Absent such an adjustment, we find that application of both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period is an unreasonable practice.”)

such an index;<sup>8</sup> and (3) the Board had concerns about the practicality of deconstructing a base rate.

Cargill now seeks to revive its Double Recovery claim by alleging that BNSF officials have stated that fuel costs are embedded in the base rate and that BNSF expressed the intent not to over recover its fuel costs, either before or after rebasing. Cargill advances three arguments in support of its request for leave to amend its complaint with these allegations. Cargill argues that: (1) the Board was wrong to be concerned about the practicality of deconstructing base rates to ascertain the fuel cost component, because BNSF “separately identif[ies] the fuel cost component in its base rates,” Petition for Partial Reconsideration at 7; (2) “if, as BNSF represents, it is using its fuel surcharge to recover fuel costs ‘not embedded in the transportation rate offered to the customer’ . . . it is making inherently inconsistent representations when it applies rate adjustments, even ones based on an index that excludes a fuel component, to the entire base rate,” *id.*;<sup>9</sup> and (3) granting it leave to amend its complaint would be consistent with the Board’s decision in Dairyland.

We find Cargill’s arguments unpersuasive. First, our concerns about deconstructing base rates remain. In Fuel Surcharges, the Board proscribed only one form of double recovery—capturing increased fuel costs through a fuel surcharge and at the same time increasing the base rate by means of a rate adjustment mechanism or index that reflects fuel cost increases. This practice, double dipping, is readily recognizable and does not require the deconstruction of base rates. Nor does it require an in-depth analysis of how carriers set base rates or to what extent

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<sup>8</sup> BNSF had stated that its “[n]ew rates are set from time to time . . . without express reference to costs.” Motion for Partial Dismissal at 9.

<sup>9</sup> This is because, according to Cargill, when BNSF applies such an index or adjustment mechanism to its base rates, it is necessarily increasing the fuel cost component of its base rates. Cargill offers the following example:

[A]ssume that BNSF sets a base rate of \$2,000 per car on a movement with a base fuel cost component of \$200 per car, reflecting the fuel price at the fuel surcharge strike price; that a fuel surcharge of \$50 per car is applied to the movement; and that the entire base rate is adjusted by 5% using the All-inclusive Index Less Fuel (“AIIS-LF”), an adjuster that does not reflect changes in fuel prices. Application of the AIIS-LF adjuster to the \$200 fuel component of the base rate produces a \$10 increase in the base fuel component (\$200 x .05), an increase that is also captured by the \$50 fuel surcharge . . . . *Id.* at 7-8.

their adjustments to base rates capture fuel cost increases also captured by a fuel surcharge. But that is precisely what Cargill's Double Recovery count would require.

Even if, as Cargill alleges, BNSF has acknowledged that some fuel costs are embedded in the base rates, that does not mean that it would be practical to deconstruct the base rates. Cargill assumes, but offers no support for its contention, that BNSF "separately identif[ies] the fuel cost component of its base rates." Petition for Partial Reconsideration at 7. As the Board explained in the January 4 Decision, slip op. at 6, many different factors go into a carrier's decisions on setting base rates.<sup>10</sup> Thus, we see no reason to believe that carriers set their base rates in the sort of easily quantifiable, bottom-up fashion that Cargill appears to envision.

Second, and more important, we do not agree that a carrier makes inherently inconsistent representations when it both applies a fuel surcharge and increases its base rate with a rate adjustment mechanism or index that explicitly excludes a fuel component. When a carrier uses such an adjustment mechanism or index, the carrier is effectively representing that the entire increase applies to the non-fuel components of the base rate. To the extent the base rate increase exceeds the carrier's non-fuel costs, the reasonableness of the resulting rate may be challenged, but only in a rate reasonableness proceeding.

To deem it a misrepresentation when a carrier both applies a fuel surcharge and increases base rates by an adjustment mechanism or index that excludes fuel would effectively deny carriers a simple and transparent way to raise base rates, particularly to keep pace with inflation. This is precisely what Cargill's proposed redefinition of the double dipping cause of action would accomplish.

Because Cargill's complaint, even as amended, would not be able to allege that a carrier makes inherently inconsistent representations when it both applies a fuel surcharge and increases base rates with a rate adjustment mechanism or index that explicitly excludes a fuel component, a finding that BNSF has double recovered in the manner alleged by Cargill here would violate Union Pacific. As that case instructs, "if the challenged 'practice' is manifested exclusively in the level of rates that customers are charged," then the challenge is really to the level of the rate

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<sup>10</sup> Specifically, the Board stated:

We also have practical concerns about trying to deconstruct a base rate. Costs—including fuel costs—can be among the factors that carriers consider in setting their base rates. But there are many other factors as well—such as general market conditions, carrier-specific financial condition, product demand and the competitive options available to particular shippers—all of which could influence how a carrier structures its pricing. The Board does not attempt to attribute values to each component of rail pricing actions or rule on a carrier's rate on a component-by-component basis.

and may be maintained only after a finding of market dominance. Union Pacific, 867 F.2d at 649. Cargill's Double Recovery claim, even as Cargill proposes to amend it, focuses on a "practice"—allegedly recovering the same fuel costs in both the base rate and the fuel surcharge—that is manifested exclusively in the level of rates that Cargill is charged. Because Cargill has not filed a complaint challenging the reasonableness of BNSF's rates, which would require a finding that BNSF has market dominance over the movements at issue here, the Board may not assess the reasonableness of that "alleged practice" here.

Finally, Dairyland does not justify giving Cargill leave to amend the Double Recovery count as proposed. Dairyland did not involve a request for leave to amend a complaint. There, the Board denied a motion to dismiss a fuel surcharge complaint, but clarified the permissible issues because it appeared that the complainant's underlying rationale was not properly developed. Here, in contrast, the Board granted BNSF's motion to dismiss the Double Recovery claim. Before we can grant Cargill permission to amend its complaint, the proposed amendment must "stat[e] a cause of action." 49 C.F.R. § 1111.2(a). For the reasons discussed above, the new allegations that Cargill proposes to add would not turn the Double Recovery into a cognizable cause of action. Accordingly, Cargill's request for partial reconsideration, which we have construed as a petition for leave to amend the complaint, is denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Cargill's petition for partial reconsideration is denied.
2. This decision is effective on the service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.